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HEARING DATE & TIME:
JANUARY 28, 2015 AT 10:00 AM

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	CHAPTER 13
GENNARO ALAIO and ELIZABETH A. ALAIO,	CASE NO.: 12-22220 (RDD)
Debtors.	

NOTICE OF HEARING ON THE DEBTORS' APPLICATION FOR (I) A DOWNWARD MODIFICATION OF THEIR CHAPTER 13 PLAN PAYMENTS BASED UPON A CHANGE IN CIRCUMSTANCES; (II) LIMITING DISTRIBUTION TO NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; (III) CONFIRMATION OF THEIR AMENDED CHAPTER 13 PLAN; AND (IV) FOR SUCH OTHER AND FURTHER RELIEF AS MAY BE APPROPRIATE

PLEASE TAKE NOTICE that a hearing on the motion of **GENNARO ALAIO** and **ELIZABETH A. ALAIO**, the above-referenced debtors (the "Debtors"), to downwardly modify payments required under their Chapter 13 plan, limiting distribution to New York State Department of Taxation and Finance and confirmation of their amended Chapter 13 plan (the "Amended Plan") will take place on January 28, 2015 at 10:00 AM before the Honorable Robert D. Drain, United States Bankruptcy Judge, in his Courtroom, at the United States Courthouse at 300 Quarropas Street, White Plains, New York 10601.

PLEASE TAKE FURTHER NOTICE, that a copy of the Amended Plan is annexed hereto. A copy of the application is available on the Bankruptcy Court's website, www.nysb.uscourts.gov or from the undersigned on request.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief sought in the application must comply with applicable law and be served on the undersigned with a copy to the Bankruptcy Judge's Chambers at least (3) days prior to the return date. Unless objections are interposed, the relief sought in the application may be granted.

Dated: White Plains, NY
December 24, 2014

PENACHIO MALARA, LLP
/s/ Anne Penachio
Anne Penachio, Esq.
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UNITED STATES BANKRUPTCY COURT
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In re :

GENNARO ALAIO and ELIZABETH A. ALAIO, :

Debtors. :
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CHAPTER 13

CASE NO.: 12-22220 (RDD)

THE DEBTORS' APPLICATION FOR (I) A DOWNWARD MODIFICATION OF THEIR CHAPTER 13 PLAN PAYMENTS BASED UPON A CHANGE IN CIRCUMSTANCES; (II) LIMITING DISTRIBUTION TO NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; (III) CONFIRMATION OF THEIR AMENDED CHAPTER 13 PLAN; AND (IV) FOR SUCH OTHER AND FURTHER RELIEF AS MAY BE APPROPRIATE

TO: THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

GENNARO ALAIO and **ELIZABETH A. ALAIO**, the debtors herein (the "Debtors"), by and through their counsel, **PENACHIO MALARA, LLP**, in support of their application for a downward modification of their Chapter 13 plan payments, limiting distribution to New York State Department of Taxation and Finance and confirmation of their Amended Chapter 13 plan, respectfully set forth as follows:

I. BACKGROUND

1. On or about February 5, 2012, the Debtors jointly filed a voluntary petition for relief under Chapter 13 of Title 11 of the United States Code, as amended (the "Bankruptcy Code"), with the Clerk of this Court and the case was referred to the Bankruptcy Judge herein.

2. Jeffrey L. Sapir was appointed Chapter 13 trustee and continues to serve in that capacity (the "Trustee").

3. The Debtors filed for bankruptcy relief to address numerous personal financial issues. Their financial setbacks were caused by the overall reverses in the economy. The Debtor

co-owns a restaurant, Diamore Delicious Delights, Inc., with his brother, Giacomo Alaio (the "Restaurant"). The Co-Debtor is employed at the Restaurant. The Restaurant was severely damaged by a fire in or about 2011. Although insurance covered a large portion of the loss, it did not cover all losses. The Restaurant was closed for approximately 6 months which resulted in a decrease in their income.

4. During their Chapter 13 proceeding, the Debtors obtained a modification of their first mortgage with Bank of America under the Department of Justice settlement. The Court approved their motion to set aside junior liens, including a second mortgage.

5. The Debtors' primary obligation was a debt owed to New York State ("NYS") for unpaid sales tax. NYS filed amended claim numbered 2 in the amount of $115,039.09, of which $103,823.95 is classified as secured or priority. A copy of the claim is annexed hereto as Exhibit A.

6. The Debtors' Chapter 13 plan (the "Plan") was approved by the Court on or about September 16, 2013. A copy of the Plan is annexed hereto as Exhibit B. The Plan calls for the following payments: $3,545.00 for 10 months, $4,000.00 for 4 months and $4,300.00 for 46 months. The Plan provides for payment in full to NYS on the secured and priority portions of its claim.

7. The Debtor has been struggling to make the payments. He has been funding the payments from business income generated by the Restaurant.

8. In or about March 2013, NYS began to undertake collection efforts on the liability set forth in the claim from the Restaurant. In order to avoid disruption in business, the Debtor and his brother agreed to make payments to NYS from the Restaurant. NYS entered into an Installment Payment Agreement dated January 21, 2014 (the "IPA") with the Debtor's brother,

Giacomo Alaio, which calls for the payment of $3,500.00 per month for 58 months together with additional fees for a total of $201,209.00. Upon information and belief, it is NYS' practice to require principals of corporations to execute installment payment agreements. A copy of the IPA is annexed hereto as Exhibit C.

9. The Restaurant has been making payments under the IPA. Copies of bank statements reflecting such payments can be provided to the Court. They are not attached as they contain extraneous information. As a consequence of IPA, the Debtor's business income has been diminished because the Restaurant has had to bear the additional expense of payments under the IPA. The decrease in business income from the Restaurant has made it difficult for the Debtors to fund the Plan.

10. As a result of the IPA, NYS is receiving payments from two sources, and will be satisfied nearly twice as fast.

11. The Debtors seek to downwardly modify their plan payments to $1,500.00 per month with NYS only to receive an additional distribution of $18,420.16, representing the income tax portion of the liability due from the Debtor. The balance due will be paid outside of the Chapter 13 plan by the Debtor's Corporation.

12. With the modification, the projected distribution to unsecured creditors would be 15% as per the Amended Worksheet annexed hereto as Exhibit D. The Debtors have prepared an amended Chapter 13 plan, a copy of which is annexed hereto as Exhibit E (the "Amended Plan").

II. RELIEF REQUESTED

13. By this application, the Debtors seek an order from this Court approving the Amended Plan, approving their request for a downward modification, limiting the amount

distributed to NYS and approving their Amended Plan.

III. JURISDICTION AND STATUTORY PREDICATES FOR RELIEF

14. This Court has jurisdiction over the application pursuant to 28 U.S.C. 157 and 1334 and the "Standing Order of Referral Cases to Bankruptcy Judges" dated July 10, 1984 (Ward, Acting C.J.). Venue in this district is proper pursuant to 28 U.S.C. §1408. The statutory predicates for the relief sought herein are Sections 105 and 1329 of the Bankruptcy Code.

IV. THE DEBTORS' AMENDED PLAN SHOULD BE CONFIRMED

15. Pursuant to Section 1329 of the Bankruptcy Code, which governs modification of a plan after confirmation, a debtor may seek to reduce the amount of payments provided for under the plan. 11 U.S.C. § 1329(a).

16. The post-confirmation modification of a chapter 13 plan is controlled by 11 U.S.C. § 1329. A confirmed chapter 13 plan may be modified on application by a debtor, trustee or creditor to increase or reduce payments after confirmation but before completion of debtor's payments. 11 U.S.C. §1329(a)(1).

17. 11 U.S.C. § 1329 states, in pertinent part, that:

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to-

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
(2) extend or reduce the time for such payments; or
(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

(b) (1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of his title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

18. It is well settled that a confirmed Chapter 13 plan may be modified to reduce payments to creditors. See e.g. *In re Smura*, 84 B.R. 327 (Bankr. W.D.N.Y. 1988).

19. Post-confirmation modification of a Chapter 13 plan may be accomplished "if a problem arises in the execution of the plan." H.R.Rep. No. 95-595 p. 125, U.S.Code 850 Cong. & Admin.News 1978, pp. 5787, 6086, Bankr.L.Ed., Leg.Hist. § 82.4.

20. A debtor, on request with a showing of changed circumstances, may move to modify a plan only upon showing of change in financial circumstances since the confirmation. *In re Walker*, 114 B.R. 847 (Bank. W.D.N.Y. 1990); *In re Moseley*, 74 B.R. 791, 792 (Bankr.C.D.Cal.1987). Post-confirmation modification by a debtor may be allowed where the modified plan would have been appropriate had the present circumstances existed originally. See *In re Taylor*, 99 B.R. 902 (Bankr. C.D.Ill.1989).

21. In the instant case, the downward modification sought by the Debtors is appropriate for several reasons.

22. First, the Debtors have experienced an unanticipated reduction in their expenses and income from the time their plan was confirmed. This change was caused by the decrease in business income from the Restaurant.

23. Second, the Debtors are proceeding in good faith. While "good faith" is not specifically defined in the Bankruptcy Code, it can be inferred from the circumstances presented. In the instant case, the Debtors have shown good faith by already having made 41 payments

towards their confirmed plan and by being honest and straight forward regarding their financial situation. Moreover, the Debtors have experienced legitimate financial reverses emanating from business reverses.

24. Third, the Amended Plan is feasible, as demonstrated by Amended Schedule I which will be filed forthwith.

V. NOTICE AND WAIVER OF MEMORANDUM OF LAW

25. Notice of this application was served on the U.S. Trustee, the Chapter 13 Trustee, all creditors, and all parties that have filed a "Notice of Appearance."

26. No previous application for the relief sought herein was sought from this, or any other Court.

27. Because the facts and circumstances set forth herein do not present novel issues of fact or law, it is respectfully requested that the Court waive the requirement of filing a memorandum of law imposed by the Local Bankruptcy Rules.

WHEREFORE, it is respectfully requested that the Court grant the relief requested herein, permit downward modification of the Debtors' Plan, limit the distribution to NYS, confirm the Amended Plan and grant such other and further relief as may be appropriate.

Dated: White Plains, NY
December 24, 2014

PENACHIO MALARA LLP

By:/s/ Anne Penachio
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